FILED
JAN 18 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 981

SIDNEY FELBER,

Petitioner,

—against—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

PHILIP J. RYAN
Attorney for Petitioner
60 East 42nd Street
New York, New York

MORTON L. GINSBERG
Of Counsel

INDEX

	PAGE
Opinions Below	1
Jurisdiction	4
How Federal Question Is Presented	4
Questions Presented	5
Statement	6
REASONS FOR GRANTING THE WRIT—The procedure by which the State of New York has excluded petitioner from the practice of law as outlined in Section 90, Subdivisions 4 and 5, of the Judiciary Law of the State of New York violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment	16
A. The Due Process Clause of the Fourteenth Amendment requires that any and all adverse consequences of a void conviction must be totally eradicated	16
B. Petitioner was denied his presumption of innocence in the reinstatement proceeding	19
C. Before a state can deprive a person of the right to earn a livelihood in his profession, it must prove wrongdoing on his part by clear and convincing evidence	20
D. The procedure by which petitioner was disbarred denied him equal protection of the laws	21
Conclusion	24

PAGE

Appendix A, Constitution and Statutes 1a

Appendix B, Opinions Below 3a

Appendix C, Excerpts from Petition for Reinstatement Raising Federal Constitutional Questions 16a

Appendix D, Orders in this Proceeding 22a

CITATIONS

Barsky v. *Board of Regents*, 347 U.S. 442 (1953) ...18, 23

Cohen v. *Hurley*, 366 U.S. 117 (1961) 17, 23

Dent v. *State of West Virginia*, 129 U.S. 114 (1889)... 17
Donegan, Matter of, 294 N.Y. 704 19

Farrell, In re, 237 App. Div. 678 (1933) 21n
Finn, Matter of, 256 App. Div. 288 (1939) 22
Fiswick v. *United States*, 329 U.S. 211 (1946) 17, 18
Frank v. *Mangum*, 237 U.S. 309 (1915) 22

Garland, Ex Parte, 4 Wall 333 (1866) 17, 18
Griffin v. *Illinois*, 351 U.S. 12, *reh. den.* 351 U.S. 958 (1956) 22

Harris v. *United States*, 382 U.S. 162 (1965).....17, 20

Joint Anti-Fascist Committee v. *McGrath*, 341 U.S. 123 18

Kaufman, Matter of, 245 N.Y. 423 (1927) 19
Kent v. *United States*, 383 U.S. 541 (1966).....17, 19
Konigsberg v. *The State Bar of California*, 354 U.S. 252, *reh. den.* 354 U.S. 927 (1957) 17, 20

Long v. *District Court of Iowa*, 87 S. Ct. 362 22

MacFarland v. *American Sugar Refining Co.*, 241 U.S. 79 (1916) 20

PAGE

Riley, In re, 277 App. Div. 993 19

Schware v. *Board of Bar Examiners,* 353 U.S. 232 (1957) 17

Secombe, Ex Parte, 60 U.S. 9 (1856) 17

Speiser v. *Randall,* 357 U.S. 513 (1958) 20

Stein, In Re, 249 App. Div. 382 19

Tot v. *United States,* 319 U.S. 463 (1943) 20

United States v. *Morgan,* 22 F. 2d 673 (2d Cir. 1955) 17, 18

United States v. *Morgan,* 346 U.S. 502 (1953) 17

Willner v. *Committee on Character and Fitness,* 373 U.S. 96, *clarif. denied,* 375 U.S. 950 (1963) 17

TEXTS

59 Yale Law Journal 786 18

Note on Reinstatement to the Bar, 70 A.L.R. 2d 268 22

STATUTES

Education Law of the State of New York, Sections 6514, 6613(12) 23

Judiciary Law of the State of New York, Section 90 ..... 16, 18, 21, 23

RULE

Rule VIII of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors-at-Law 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

SIDNEY FELBER,

Petitioner,

—against—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner prays that a Writ of Certiorari issue to review an Order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, denying his petition for reinstatement to the Bar of the State of New York.

Opinions Below

This is the fifth petition for reinstatement to the Bar brought by petitioner, all of which have been denied. Petitioner was automatically disbarred upon his having been convicted of a felony (Judiciary Law of the State of

New York, Section 90, Subd. 4). This conviction was reversed by the Appellate Division of the Supreme Court, First Department, in an opinion reported at 264 App. Div. 181 (1941) and contained in the appendix herein, *infra* at p. 3a. The indictment was later dismissed upon recommendation of the District Attorney.

The decisions and opinions of the various Courts involved, culminating in this Petition are as follows:

June 13, 1941	Conviction of petitioner in Court of General Sessions of first degree grand larceny and third degree forgery.
October 31, 1941	Disbarment by Appellate Division, First Department, based solely upon certificate of conviction (262 App.Div. 1010, 30 N.Y.S. 2d 498).
May 8, 1942	Conviction reversed by Appellate Division, First Department (264 App.Div. 181, 34 N.Y.S. 2d 609). (opinion printed in Appendix B hereto, *infra,* 3a).*
September 1, 1942	Indictment dismissed by Court of General Sessions on recommendation of District Attorney.
September 25, 1942	Motion by petitioner to vacate order of disbarment.
October 2, 1942	Official Referee appointed to take testimony and report.

* Parenthetical references are to pages of the appendix herein.

February 23, 1944	Referee's adverse report. (Excerpts from which are printed in Appendix B hereto, *infra,* 12a).
July 5, 1944	Denial by Appellate Division of motion for reinstatement (268 App.Div. 156 49 N.Y.S. 2d 363). (opinion printed in Appendix B hereto, *infra,* 13a).
October 16, 1944	Motion for reargument or leave to appeal to the Court of Appeals denied by Appellate Division (268 App.Div. 853, 50 N.Y.S. 2d 771).
December 30, 1944	Leave to appeal denied by the Court of Appeals (293 N.Y. 934) (no opinion).
November 14, 1950	Notice of motion for reinstatement served.
March 31, 1953	Denial of motion for reinstatement by Appellate Division (281 App.Div. 881 119 N.Y.S. 2d 924) (no opinion).
March 7, 1961	Denial of motion for reinstatement by Appellate Division (13 App.Div. 2d 456, 212 N.Y.S. 2d 723) (no opinion).
December 1, 1964	Denial of motion for reinstatement by Appellate Division (no opinion).
February 3, 1966	Denial of motion for reinstatement by Appellate Division (no opinion).

May 5, 1966	Dismissal of appeal to Court of Appeals (no opinion).
July 7, 1966	Denial of motion for leave to appeal to Court of Appeals by Appellate Division (no opinion).
October 20, 1966	Denial of Motion for leave to appeal to Court of Appeals by Court of Appeals (no opinion).

Jurisdiction

The Court of Appeals of the State of New York denied, on October 20, 1966, the motion by petitioner for permission to appeal from the denial of his petition for reinstatement to the Bar of the State of New York, which order of denial was entered on February 3, 1966. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3) since the validity of a state statute, Section 90, Subds. 4 and 5, of the Judiciary Law of the State of New York, on grounds of repugnancy to the Fourteenth Amendment of the Constitution of the United States, is drawn in question.

How Federal Questions Are Presented

The federal questions sought to be reviewed were raised and contained in the petition for reinstatement to the Bar of petitioner, filed on November 15, 1965, in the Appellate Division, First Department. Excerpts from said petition raising said questions are set forth in Appendix C, *infra* (16a).

The said Court denied the petition and wrote no opinion (22a). Thereupon petitioner appealed to the New York

Court of Appeals, specifying that the bases of the appeal were the Federal Constitutional questions raised below and annexing a copy of the petition for reinstatement. The appeal was dismissed "upon the ground that the order appealed does not finally determine the proceeding within the meaning of the Constitution." (25a). Thereupon, pursuant to Section 5514 of the New York Civil Practice Law and Rules, a motion for permission to appeal was made in the Appellate Division, specifying the same Constitutional questions, which was denied without opinion on July 7, 1966 (27a). Petitioner then moved for permission to appeal in the New York Court of Appeals, specifying the same Federal Constitutional questions and the motion was denied by order of October 20, 1966 (29a) upon the same ground upon which the prior appeal had been dismissed, namely, that the "order appealed from does not finally determine the proceeding within the meaning of the Constitution."

Questions Presented

1. Whether Section 90, Subds. 4 and 5, of the Judiciary Law of the State of New York violates the Due Process or Equal Protection Clauses of the Fourteenth Amendment in that automatic disbarment is required upon the conviction of an attorney of a felony without provision for automatic reinstatement upon reversal of that conviction and dismissal of the indictment.

2. Whether the Fourteenth Amendment permits the State of New York to deprive an attorney who has never been validly convicted of any crime of the presumption of his innocence in a disciplinary proceeding.

3. Whether the State of New York, as a condition of reinstatement to the Bar, may impose any burden of prov-

ing innocence of wrongdoing upon an attorney whose conviction of a felony has been reversed and the indictment dismissed.

4. Whether the State of New York may deprive a man of his livelihood as an attorney for life, except by clear and convincing evidence of wrongdoing, where the wrongful acts of which he is accused are proved solely by the disputed testimony of interested witnesses.

5. Whether the Equal Protection Clause of the Fourteenth Amendment permits New York State to deny to an attorney any right or opportunity to obtain appellate review of his disbarment after the reversal of his conviction of a felony which had automatically caused his disbarment, while such appellate review is available to attorneys generally who are disbarred after disbarment proceedings as well as to all other professions in disciplinary proceedings.

Statement

Petitioner was admitted to the Bar in 1926 and disbarred by order of the Appellate Division, First Department, dated October 31, 1941 (262 App. Div. 1010, 30 N.Y.S. 2d 498). This order did not result from any disbarment proceeding but was invoked automatically upon his conviction of a felony pursuant to Subdivision 4 of Section 90 of the Judiciary Law of the State of New York.

The Appellate Division, First Department, then reversed the conviction (264 App. Div. 181, 34 N.Y.S. 2d 609 (1942)) (3a) but petitioner was not automatically reinstated, subject to possible disciplinary proceedings. Instead, Subdivision 5 of said Section 90 of the Judiciary Law of the State of New York required petitioner to

institute a reinstatement proceeding by petitioning for reinstatement to the Bar. Petitioner now contends that this procedure, and the nature and conduct of the reinstatement proceeding violated his Constitutional rights as contained in the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The factual details surrounding the disbarment of petitioner under this extraordinary set of circumstances are most concisely set forth in a memorandum filed with the Court by the New York County Lawyer's Association in connection with two of petitioner's preceding petitions for reinstatement to the Bar. This memorandum, which is part of the record of the prior proceedings to be duly filed in this Court, concluded that the Association would not oppose a reconsideration of petitioner's fitness to practice law. The Association of the Bar of the City of New York had taken that same position in connection with petitioner's second petition for reinstatement in 1950 and again upon his third petition in 1960. The factual portions of the aforesaid memorandum on behalf of the New York County Lawyer's Association is as follows:

"Sidney Felber was disbarred on October 31, 1941 on a certificate of conviction of a felony arising out of his alleged participation as an accountant in a scheme to defraud the City of New York of sales taxes in the amount of approximately $23,000.00. His conviction was subsequently reversed by the Appellate Division because of an error in the charge of the trial court. No new trial was had and the District Attorney moved to dismiss the indictment. Felber sought reinstatement on two previous occasions—in 1942 and in 1950 and reinstatement was denied on both occasions. He now moves again for reinstatement realleging innocence in connection with the tax fraud. The following is an attempt to summarize some of the salient facts in the case:

Felber, a lawyer and certified public accountant, was indicted in 1939 on thirty counts, one a misdemeanor, and twenty-nine counts involving grand larceny and forgery all arising out of New York City sales tax irregularities by his accounting practice client, Mab Motors, Inc. Mab officers, a city auditor, and two accountant employees of Felber also were indicted. The Mab officers pleaded guilty to the misdemeanor count, the trial of the accountant employees was severed, and Felber was tried alone in 1941. He was acquitted on twenty-eight counts, but convicted on one count of forgery and one of grand larceny.

The trial involved Mab's method of hiding sales tax receipts. It was admittedly accomplished by action of Felber's accounting employees who had physical control of Mab's books. At his trial Felber took the stand and denied all knowledge of hiding of these receipts as well as of any personal work on Mab's books. However, his accounting employees testified that he had knowledge of the scheme.

Shortly after conclusion of his trial, and while his appeal was pending, Felber was disbarred solely on certification of his felony conviction. His certificate as Certified Public Accountant was not disturbed.

On appeal, the Appellate Division reversed his conviction and ordered a new trial on the ground that there was no independent corroboration of the testimony of self proclaimed accomplices of Felber's, his accountant employees. No new trial was had and the indictment against Felber was dismissed. It is of somewhat more than passing interest that the indictments against Felber's accounting employees, never moved for trial during the period of Felber's trial, were likewise dismissed despite their own admissions against interest at Felber's trial.

Following dismissal of the two remaining counts of the indictment against him, Felber moved for reinstatement to the bar and the Association of the Bar opposed the motion. A hearing was held before Referee Marks but the transcript of testimony given at that hearing has not been examined by our Committee. According to Felber, the only testimony against him at the hearing was that of his two accountant employees who again testified to Felber's knowledge of the tax fraud. Apparently Referee Marks believed their testimony despite Felber's vociferous denials, and in 1944 Marks filed an adverse report with the Appellate Division which then denied Felber's motion.

Thereafter, in 1950, Felber made a new application for reinstatement. He submitted letters from Honorable Jonah J. Goldstein, Judge of the Court of General Sessions, who had presided at his trial, and from Edward M. Rose, formerly assistant district attorney of the County of New York who had conducted the trial prosecution, and an affidavit from Major Charles J. Saperstein who had been foreman of the jury which convicted Felber and an affidavit of Meyer M. Lasker, who had been secretary of Mab during the period of the tax frauds in question.

Judge Goldstein's letter states, in part:

> 'The acquittal by the jury on the Conspiracy Count indicated that they did not find Mr. Felber was a party to a conspiracy to defraud the City of New York of sales tax justly due. Mr. Felber, when he testified, made a good impression upon me.
>
> On June 30, 1941, after studying the Probation Report, I suspended sentence and placed Sidney Felber on probation. The Probation Report revealed that Mr. Felber was a well-adjusted individual, modest and unassuming; one who had conducted himself in an

orderly fashion; was well-regarded in the community and whose personal life was beyond reproach.

On appeal your Court unanimously reversed the judgment of conviction. Subsequently on August 28, 1942, upon the recommendation of the District Attorney, my colleague John J. Sullivan, dismissed the indictment.

In the light of the opinion of the Appellate Division, it was clearly my duty to have dismissed the indictment instead of submitting it to the jury. Had I done so, disciplinary action against the defendant would never have been taken. Therefore, I keenly feel that his disbarment was brought about through an error of law on my part.

Accordingly I strongly urge that Mr. Sidney Felber be re-instated to the bar.'

Assistant District Attorney's letter states, in part:

'Prior to and during the trial, and while the jury was deliberating, I had offered to accept from the defendant, with the approval of the Presiding Judge, a plea of guilty to the crime of Conspiracy, a misdemeanor, to cover the entire indictment.

The defendant, even though importuned by his own attorney to accept this offer, steadfastly refused, maintaining his complete innocence. His last refusal came when things looked blackest for him at the conclusion of the trial, and then when he stated he was innocent I told him that he should not plead guilty to any crime or offense and that under no circumstances would I recommend the acceptance of any please of guilty.

Upon the reversal of the conviction, I made an exhaustive and detailed study of the case and the record, and the opinion of this Honorable Court, and came to the conclusion, that had I understood and

known the law as laid down by this Honorable Court and as applied to all the facts in this case, I would not have tried this defendant in the first instance.

I now therefore feel morally responsible that a Court record was made against Mr. Felber which in the first instance should not have been made. Without that record, which your Honorable Court held insufficient and inconclusive, Mr. Felber would not have been disbarred. It would seem to me therefore, and I most respectfully submit, that Mr. Felber has been punished as severely or more so, by a legally erroneous verdict than if he had pleaded guilty to a misdemeanor.

These facts, I respectfully submit, press heavily on my conscience and my mind, both as a man and a lawyer. I respectfully submit that this long disbarment of Mr. Felber has been in a large part brought about by my action in bringing him to trial. I was wrong as this Honorable Court has pointed out in its opinion and I therefore feel that I owe a duty to this Honorable Court, and to Mr. Felber to do anything in my power to right this error on my part.

Therefore, I respectfully recommend that Mr. Sidney Felber be reinstated to the Bar.'

The affidavit of the Jury Foreman Major Charles L. Saperstein avers, in part:

'I further told Mr. Felber that during the deliberations all of the jurors felt that he was innocent and would have exonerated him completely were it not for the judge's charge, that as Judge Goldstein had charged the jury we felt impelled as a matter of law to find some verdict of guilt irrespective of our feelings in the matter.

I reiterate that it was then, and is now, my feeling that Mr. Felber was a victim of unfortunate circumstances resulting from the way in which the charge of the judge was worded. All of the jurors felt that

Mr. Felber was free of any complicity in the tax frauds yet the judge's charge was phrased in such a manner that it confused us and gave us the impression that of necessity we had to bring in a verdict of guilty of something charged in the indictment.

I would like to go on record as stating that we believed Mr. Felber's testimony that he was innocent of any wrongdoing. On the evidence presented if the matter had been left to the jury exclusive of the judge's charge I think there is no doubt but that we would have found him innocent of all charges.'

The affidavit of Mr. Lasker, an officer of Mab Motors, Inc., avers in part:

'After the tax shortages had been disclosed Mr. Felber came to me and asked me the reason therefor. I explained that in reality the sales tax technically retained was our own money because most of our customers had refused to pay sales taxes and if we had refused to do business because of this we would not have been able to continue to do business at all. He insisted that the City receive all the money due it at once. I told him that application for determination of the tax due would be made to the City immediately. He told me that inasmuch as he was unfamiliar with the books he would have to send the accountant employed by him at the time, Barrett by name, to prepare the necessary papers for the City as long as Barrett continued with him but that as a result of what had happened Barrett could not stay with him.

Mr. Felber was innocent of implication in this sales tax case. He did not participate in the matter and as far as I knew was unacquainted with what was going on. Furthermore, he received from us no more than modest fees. As our business grew his retainers were increased, but, as I remember, they never ex-

ceeded $50.00 per month for each of the two corporations.'

The Association of the Bar of the City of New York in the 1950 application for reinstatement filed a memorandum which relied on Referee Marks' report on the first hearing and suggested that the aforementioned documents were irrelevant. (As previously indicated the basis of Referee Marks' report was his belief in the testimony of the self proclaimed accomplices of Felber.) However, the memorandum suggested that justice might be served by reconsideration of the extent of punishment imposed. In 1953 the Appellate Division denied this second application for reinstatement.

* * * *

Felber now lives in Florida in straightened economic circumstances. He has secured a real estate broker's license despite full disclosure of the facts related herein on his application. He has applied for permission to practice law in Florida but the Florida Board of Bar Examiners rejected his application until the situation with respect to reinstatement in New York is clarified.

The Association of the Bar of the City of New York, in its memorandum submitted in connection with Felber's 1950 petition for reinstatement to the Bar, stated its position, in part, as follows:

> '* * * the extent of punishment here imposed was removed from the discretion of the Court by a chain of circumstances unfortunate, to say the least, for the petitioner. That is to say, the disbarment itself was automatic following the conviction which was later reversed.
>
> It may well be that this Court, if it had first received the case for determination upon a motion to confirm the report of the Official Referee, would have

disbarred the petitioner. On the other hand, the Court might have imposed a lesser degree of discipline.

We may summarize our position in this matter as follows: (1) We submit that the factual basis for discipline of petitioner has been undisturbed; (2) we suggest that justice may well be served by a reconsideration by the Court of the extent of punishment imposed.'

In connection with Felber's pending petition for reinstatement, the Association of the Bar of the City of New York has stated in its memorandum filed with the Court, in part, as follows:

'In view of the fact that Petitioner has now been disbarred more than nineteen years, the disbarment having been predicated on a conviction later reversed, and in view of the other circumstances of this case and in light of recent decisions of this Court, the Association does not oppose a reconsideration by this Court of the discipline imposed upon Petitioner.

In the event that the Court should decide to reconsider the extent of discipline to be imposed it is respectfully suggested that the Committee on Character and Fitness be directed to report to the Court as to Petitioner's moral character and fitness at this time.'

At a recent meeting of the Committee on Discipline of our Association, the matter of Felber's petition for reinstatement was considered and all the members present voted in favor of filing a memorandum with the Appellate Division to the effect that our Association joins with the Association of the Bar of the City of New York in not opposing a reconsideration.

If the Board of Directors approves this recommendation on the part of the Committee on Discipline, it is the

writer's intention to send a copy of this memorandum to the Court."

The Appellate Division expressly found in reversing petitioner's conviction, that no evidence was adduced, apart from the testimony of the two self-interested accountants employed by petitioner, which linked petitioner with the crimes of which he was convicted (6a-7a). The District Attorney could find no such evidence and the indictment was for that reason dismissed upon his recommendation. The hearing which was held upon petitioner's reinstatement petition involved basically the same testimony as had been given at the criminal trial, and which had been held insufficient as a matter of law to convict as aforesaid, by the Appellate Division.

Nevertheless, petitioner remained disbarred following the reversal of his conviction and before any valid proceeding or hearing establishing his guilt of any wrongdoing was held. He was required to petition for reinstatement, thereupon bearing both the psychological as well as the actual burden of proof, as will be demonstrated, *infra*. Petitioner now contends that such a procedure cannot be consonant with the guarantees of due process of law and equal protection of the laws as contained in the Fourteenth Amendment. It must be emphasized that the Appellate Division expressly found that petitioner enjoyed a good reputation in his business and social community and that no proof whatever was adduced "that he shared in any way in the fruits of the crimes admittedly committed by others . . ." (11a). The alleged crimes had nothing to do with his law practice and his record was otherwise totally unblemished. Yet, by virtue of the procedure herein complained of, petitioner has been disbarred for life.

REASONS FOR GRANTING THE WRIT

The procedure by which the State of New York has excluded petitioner from the practice of law as outlined in Section 90, Subdivisions 4 and 5, of the Judiciary Law of the State of New York violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Extremely significant federal Constitutional questions of wide application in the area of the exclusion by a State of practitioners from the practice of their occupation or profession are herein involved. The granting of the writ will enable this Honorable Court to elaborate and define the standard of procedure which is required by the Due Process and Equal Protection Clauses of the Fourteenth Amendment before a state may deprive a person of his livelihood in circumstances where the sole basis for the deprivation is based upon alleged criminal conduct. The primary contention of petitioner is that Subdivisions 4 and 5 of Section 90 of the Judiciary Law, and the procedure for automatic disbarment contained therein, violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment where an attorney has been convicted of a felony, which conviction is reversed and the indictment dismissed.

A. The Due Process Clause of the Fourteenth Amendment requires that any and all adverse consequences of a void conviction must be totally eradicated.

The Constitutional guarantees contained in the Fourteenth Amendment have been held by this Court to prevent a state from arbitrarily or capriciously excluding a person from practicing law or any other occupation.

Schware v. *Board of Bar Examiners,* 353 U.S. 232, 238-239 (1957); *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96, 102, *clarif. denied,* 375 U.S. 950 (1963); *Cohen* v. *Hurley,* 366 U.S. 117, 122, 123 (1961); *Dent* v. *State of West Virginia,* 129 U.S. 114 (1889). See *Ex Parte Secombe,* 60 U.S. 9 (1856). Neither the grounds for the exclusion, nor the procedure employed, may contravene the Due Process or Equal Protection Clauses of the Fourteenth Amendment since the right to practice law is not "a matter of grace and favor," *Willner* v. *Committee on Character and Fitness, supra,* at p. 102; *Ex Parte Garland,* 4 Wall. 333, 379 (1866). Although the matter is not deemed "criminal", "its consequences . . . take it out of the ordinary run of civil cases" since exclusion from practice "has grave consequences for a man who has spent years of study and a great deal of money in preparing to be a lawyer", and, therefore, the reasons for the exclusion may not contravene either the Due Process or Equal Protection Clauses of the Fourteenth Amendment. *Konigsberg* v. *The State Bar of California,* 353 U.S. 252, 258, *reh. den.* 354 U.S. 927 (1957). The term "civil" as opposed to "criminal" is not dispositive in the application of the guarantees contained in the Bill of Rights since the harshness of the consequences determine the standard of due process which is applicable. See *Kent* v. *United States,* 383 U.S. 541 (1966); *Harris* v. *United States,* 382 U.S. 162 (1965). Before a person is to be excluded from earning his livelihood, the strictest burden of fairness and propriety, substantively as well as procedurally, should be borne by the state.

The Due Process Clause of the Fourteenth Amendment precludes the imposition or attachment by the state of any consequences, whether termed "civil" or "criminal", resulting from a void conviction. See *United States* v. *Morgan,* 346 U.S. 502, 512-513 (1953); *Fiswick* v. *United States,* 329 U.S. 211, 223 (1946); *United States* v. *Morgan,*

222 F.2d 673 (2d Cir. 1955); 59 Yale Law Journal 786. To cause any adverse affect or consequence whatever to attach to a conviction which, upon the reversal thereof and the dismissal of the indictment, is totally void and erased, is to deprive the person convicted of due process of law, inasmuch as he is, to the extent of such consequences, being penalized or detrimented without any valid trial or judicial proceedings whatsoever. See *Joint Anti-Fascist Comm.* v. *McGrath,* 341 U.S. 123, *Fiswick* v. *U.S., supra,* at p. 223.

This, however, is precisely the result of the operation of Subdivisions 4 and 5 of Section 90 of the New York Judiciary Law. Upon the reversal of petitioner's conviction by the Appellate Division, First Department, and the subsequent dismissal of the indictment upon recommendation of the District Attorney, petitioner, at that moment, stood innocent of any crime for every conceivable purpose. Notwithstanding this self-evident situation, the operation of Subdivisions 4 and 5 of Section 90 nevertheless maintained petitioner in a state of disbarment, which had solely and automatically resulted from his erroneous conviction without any hearing, trial or judicial proceeding having at that point taken place upon with regard to his right to practice law. At the point of the reversal of his conviction, petitioner should have been relieved of any and all consequences of the void conviction, especially the disbarment which had directly resulted therefrom, subject to any disciplinary proceedings which the Association of the Bar might have seen fit to bring based on the facts which had given rise to the conviction. In the latter event, petitioner would have stood before the law as any attorney accused, *de novo,* of wrongdoing.

Indeed, the Subdivision 4 of Section 90 is arguably violative of due process simply because it invokes automatic disbarment. *Cf. Barsky* v. *Board of Regents,* 347 U.S. 442, 452 (1953). Even if it is not, certainly it could

have been construed so as to suspend the attorney pending all appeals from the conviction or the expiration of time therefor before disbarment. Petitioner would then not have been automatically disbarred at all, and, consequently, would not have been dishonored and deprived of many of the rights, as will be demonstrated, *infra*, which are enjoyed by other attorneys in ordinary disciplinary proceedings. The application by the New York Courts of the statute therefore violates not only the due process clause of the Fourteenth Amendment, but the Equal Protection Clause thereof as well.

B. Petitioner was denied his presumption of innocence in the reinstatement proceeding.

It is beyond question that in New York that the burden of proof in any proceeding for reinstatement to the Bar is on the petitioner. *Matter of Kaufman,* 245 N.Y. 423, 428-429, 157 N.E. 730 (1927); *In Re Stein,* 249 App.Div. 382; *In Re Riley,* 277 App.Div. 993. This rule was applied by the Official Referee in his report, citing and quoting the rule in *Matter of Kaufman, supra* (12a) and stating, in effect, that petitioner stood, after the conviction, as if he was applying for admission to the bar *ab initio* (13a). Inasmuch as the burden of proof of fitness to practice upon admission to the bar is upon the applicant, it is thus clear that the official referee was applying the settled rule in New York that a petitioner for reinstatement has the burden of proof. (See Rule VIII-1 of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors-at-Law, 2a.)

Since the consequences of excluding a person from the right to earn his livelihood are at least as severe as most criminal penalties, (See *Kent* v. *United States, supra,*

Harris v. *United States, supra, Konigsberg* v. *State Bar of California, supra*), the presumption of innocence should apply in disciplinary proceedings. Not only was petitioner deprived of the same, but it is manifest that as a result of the void conviction, he himself had some sort of burden of showing his innocence. In a case which turns on credibility as petitioner's did, the significance thereof cannot be underestimated. This is totally incompatible with due process of law, since, as this Court has often held, where a state seeks to deprive an individual of substantial rights, it cannot impose a burden of proof upon him. *Speiser* v. *Randall,* 357 U.S. 513, 520 (1958). The State cannot shift a burden of proof so as to declare an individual guilty or presumptively guilty of a crime. *MacFarland* v. *American Sugar Refining Co.,* 241 U.S. 79, 86 (1916); *Tot* v. *United States,* 319 U.S. 463 (1943).

C. Before a state can deprive a person of the right to earn a livelihood in his profession, it must prove wrongdoing on his part by clear and convincing evidence.

Even apart from the question of whether petitioner had the burden of proof in his reinstatement proceeding, the consequences of disbarment are so severe that a stricter standard of proof on the part of the State agency should be required than in civil cases. In determining the application of due process, this Honorable Court has rejected the label of "civil" as opposed to "criminal" in favor of a substantive approach which looks primarily toward the consequences of the particular proceeding. *Harris* v. *United States, supra, Kent* v. *United States, supra, Konigsberg* v. *The State Bar of California, supra.* Inasmuch as the consequences of a disbarment proceeding are far more severe than the penalties accruing from most criminal prosecutions, the State should be required to prove guilt

therein by clear and convincing evidence.* This is particularly true where, as here, credibility of witnesses who gave conflicting testimony is the primary determining factor in the case. Far from imposing a strict and clear burden of proof upon the Association of the Bar, the burden was, to some degree, placed upon petitioner, as was demonstrated in the preceding argument.

D. The procedure by which petitioner was disbarred denied him equal protection of the laws.

In addition to the burden of proof he bore as a result of the automatic disbarment, petitioner was also directly detrimented in other material respects by virtue of the failure to reinstate him as compared to attorneys who become the subject of ordinary disciplinary proceedings. As the Association of the Bar recognized in its 1950 memorandum (quoted from on p. 13, *supra*), because of the automatic disbarment the discretion of the Court to impose possibly a less severe sentence than complete disbarment upon petitioner was removed in the reinstatement proceeding. Due to the fact that petitioner was already disbarred, no discretion for the Court to impose a lesser sentence was present, once it confirmed the Referee's finding of guilt. Thus petitioner was clearly discriminated against as compared to other attorneys who are brought up on charges of misconduct.

Furthermore, it is apparent that the appellate rights of petitioner are quite different than attorneys who are disbarred after full disciplinary proceedings. Pursuant to Subdivision 8 of Section 90 of the Judiciary Law, attorneys in the latter class can appeal to the Court of Appeals

* In ordinary disbarment proceedings the burden of proof is by a preponderance of the evidence. *In re Farrell*, 237 App.Div. 678 (1933).

or move for permission to appeal therein if the constitutional requisites contained in Article 6, Section 3 of the New York Constitution are met. However, orders by the Appellate Division upon petitions for reinstatement are uniformly deemed to be "non-final within the meaning of the Constitution" and this was the basis of the denial by the Court of Appeals for permission to appeal (30a) (as well as the dismissal of the appeal (26a)), review of which is sought by this petition.

Thus petitioner never had the opportunity, albeit one limited by the New York Constitution, to an appellate review either as of right or in the discretion of the Court of Appeals, of the decision of the Appellate Division denying his original petition for reinstatement. Since ordinary disbarment orders are deemed "final", attorneys who are disbarred after an ordinary disbarment proceeding, as well as those practicing other professions therefore have appellate rights which were denied to petitioner. Although no appeal is required, once a State affords appellate review to certain classes of appellants, it cannot deny the same to others similarly situated. *Griffin* v. *Illinois*, 351 U.S. 12, *reh. den.*, 351 U.S. 958 (1956); *Long* v. *District Court of Iowa*, 87 S.Ct. 362, Decided December 5, 1966.

A close scrutiny of the authorities, moreover, gives rise to the strong inference that an extremely heavy burden rests upon any petitioner for reinstatement to the bar, as distinguished from an attorney in a normal disbarment proceeding and that the opportunity for obtaining reconsideration is remote. See *Matter of Finn*, 256 App.Div. 288 (1939); *Note on Reinstatement to the Bar*, 70 A.L.R. 2d 268, 275. Therefore, the ordinary disbarment procedure again favors attorneys involved therein as compared to attorneys who are automatically disbarred based upon void convictions.

Finally, in comparison to the far less severe disciplinary effect of felony convictions upon other professional classes in New York, attorneys are clearly disfavored and thus denied equal protection of the laws. This Court, for example, contrasted the far more flexible procedure applicable to doctors in *Barsky* v. *Board of Regents of New York, supra,* 347 U.S., at p. 452, pursuant to Section 6514 of the Education Law of the State of New York. Not only may the Medical Board therein determine the extent of disciplinary action even after a felony conviction, but upon reversal of the conviction, reinstatement is automatic, which is diametrically opposed to the procedure to that applicable to attorneys herein complained of, as set forth in the Judiciary Law, Section 90, Subd. 5. Solely dentists, among all other professions in New York, lose their right to practice automatically upon conviction of a felony (N.Y. Education Law, Section 6613(12)), as this Court recognized in *Barsky* v. *Board of Regents of N.Y., supra,* at p. 452 (fn. 11), but upon reversal of the conviction they are automatically reinstated (N.Y. Education Law, Section 6613 (12)). Although attorneys may have special obligations or responsibilities as officers of the Court (cf. *Cohen* v. *Hurley, supra*) such discrimination cannot be justified on any possible basis. Automatic suspension upon conviction of a felony would more than afford sufficient protection to the public.

Conclusion

For the reasons stated, the petitioner respectfully prays that the writ of certiorari be granted.

Respectfully submitted,

PHILIP J. RYAN
Attorney for Petitioner
Office & P.O. Address
60 East 42nd Street
New York, New York 10017

MORTON L. GINSBERG
Of Counsel

APPENDIX

APPENDIX A

Constitution and Statutes

Constitution of the United States

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Judiciary Law of the State of New York

Section 90. Admission to and removal from practice by appellate division.

4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.

Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys.

5. Upon a reversal of the conviction for felony of an attorney and counsellor-at-law, or pardon by the president of the United States or governor of this state, the appellate division shall have power to vacate or modify such order or debarment.

8. Any petitioner or respondent in a disciplinary proceeding against an attorney or counsellor-at-law under this section, including a bar association or any other corporation or association, shall have the right to appeal to the court of appeals from a final order of any appellate division in such proceeding upon questions of law involved therein, subject to the limitations prescribed by article six, section seven, of the constitution of this state.

Rules of the Court of Appeals for the Admission of Attorneys and Counsellors-at-Law

Rule VIII. Proof of Moral Character

VIII-1. General Regulation

Every applicant for admission to the Bar must produce before a Committee on Character and Fitness appointed by an Appellate Division of the Supreme Court and file with such Committee evidence that he possesses the good moral character and general fitness requisite for an attorney and counselor-at-law as provided in Section 90 of the Judiciary Law, which must be shown by the affidavits of two reputable persons residing in the city or county in which he resides, one of whom must be a practicing attorney of the Supreme Court of this State.

VIII-2. Supporting Affidavits

Such affidavits must state that the applicant is, to the knowledge of the affiant, a person of good moral character and must set forth in detail the facts upon which such knowledge is based. Such affidavits shall not be conclusive, and the court may make further examination and inquiry through its Committee on Character and Fitness or otherwise.

APPENDIX B

Opinions Below

Opinion of the Appellate Division, First Department, Reversing Petitioner's Conviction

(264 App.Div. 181, 34 N.Y.S. 2d 609)

PEOPLE v. FELBER.

Supreme Court, Appellate Division, First Department.

May 8, 1942.

Appeal from Court of General Sessions, New York County; Goldstein, Judge.

Sidney Felber was convicted in the Court of General Sessions of the County of New York of the crimes of forgery in the third degree and grand larceny in the first degree, and he appeals.

Reversed and new trial ordered.

Before MARTIN, P. J., and UNTERMYER, DORE, COHN, and CALLAHAN, *JJ.*

I. Maurice Wormser, of New York City, for appellant.

Frank S. Hogan, Dist. Atty., of New York City (Stanley H. Fuld, Asst. Dist. Atty., of New York City, of counsel; Richard G. Denzer and Charles W. Manning, Deputy Asst. Dist. Attys., both of New York City, on the brief), for respondent.

COHN, Justice.

Mab Motors, Inc., had two places of business where it engaged in selling automobiles; one was located in New York County and the other in Bronx County. In October, 1936, this corporation began the embezzlement of New York City sales taxes collected from its customers on sales

Appendix B—Opinions

Opinion of the Appellate Division, First Department, Reversing Petitioner's Conviction

made by its Manhattan branch. Though separate books were kept by each branch, but one return was made by the corporation through its Bronx office for every three month period since the aforementioned date. The fraud was accomplished by making entries in the Manhattan cash disbursements books indicating that the tax collected from purchasers at the Manhattan branch had been paid. A check for the amount of the sales taxes collected for the preceding three months would then be forwarded by the Manhattan office to the Bronx branch, where the payment was recorded as received for purposes other than sales taxes. The returns made to the City in each instance failed to include the taxes collected in the Manhattan office. The dishonest practices continued until an examination of the books of the corporation conducted by the City in June, 1939, uncovered the thefts.

The People charged that defendant Felber, who was an accountant employed by Mab Motors, Inc., aided and abetted the embezzlement by devising the system of book entries and by directing that false notations be made in the records of the Manhattan branch. He was convicted of the larceny of $2,470.68, the amount collected by the Manhattan branch from customers for sales taxes during July, August and September, 1938. His conviction for forgery was predicated upon an entry made in the books of the Manhattan office on October 14, 1938, falsely indicating that the proceeds of the check in that sum were to be paid to the City.

The indictment against defendant and nine others, including Mab Motors, Inc., contained counts charging conspiracy, grand larceny by embezzlement, and forgery in the third degree. The corporate defendant, and four individual defendants who were officers and stockholders of

Appendix B—Opinions

Opinion of the Appellate Division, First Department, Reversing Petitioner's Conviction.

Mab Motors, Inc., pleaded guilty to the charge of conspiracy. At the opening of the trial, the case was severed as to four other defendants, including two accountants employed by Felber, namely, Harry Barrett and Harold Wolk. The defendant Felber was tried alone.

Ten counts of statutory larceny and the nine counts of forgery were grounded upon ten separate checks sent from the Manhattan to the Bronx office during the period commencing October, 1936, and ending June, 1939. Each check represented the accumulation of taxes collected from customers for the preceding three month period. The jury convicted defendant of only one transaction, namely, that based upon the embezzlement of the sales taxes collected in the Manhattan branch for July, August and September of 1938. On all other charges, defendant was acquitted.

[1, 2] It is insisted that no larceny has been proved against this defendant because the officers of Mab Motors, Inc., whom defendant was charged with aiding and abetting, did not themselves appropriate any money from the City; that while they may be penalized for failure to pay over the sales taxes, they may not be charged with embezzling funds because the moneys collected from taxpayers at no time belonged to the City. We find no merit to this contention. Mab Motors, Inc., had in its possession and custody as bailee, agent or trustee for the City, the funds which it had collected from its customers, and when it and its officers applied such sums to their own use, the larceny was complete. The fraudulent conversion, by a vendor, of City sales tax money so collected from purchasers, constitutes larceny. That is the rule in other jurisdictions, *People* v. *Kopman*, 358 Ill. 479, 193 N.E. 516; *State* v. *Sankey, S.D.*, 299 N.W. 235; *Anderson* v. *State*, 221 Wis.

78, 265 N.W. 210, and it is the law of this State, Penal Law, § 1290, subd. 2.

[3] Defendant also assigns as error that the false entry, which was the basis of the twenty-sixth count of the indictment on which he was convicted, was not a forgery because it was a truthful entry. The entry in question was made in the cash disbursements book of Mab Motors' Manhattan branch. It recited that in October, 1938, a check had been drawn for City sales tax on the Marine Midland Trust Co. in the sum of $2,470.68 and sent to the Mab Motors' Bronx office for payment to the City. The entry reflected a payment of sales taxes by the Manhattan branch of the Mab Motors Co. when no such payment had been made or was ever contemplated. Since October of 1936, the device of sending checks from the Manhattan branch to the Bronx branch had been regularly employed to defraud the City. The entry was nothing more than a sham which concealed the embezzlement of the sales tax funds, and was obviously a false record. *United States* v. *Darby*, 289 U.S. 224, 226, 227, 53 S.Ct. 573, 77 L.Ed. 1137; *Billingsley* v. *United States*, 8 Cir., 178 F. 653.

At the trial, the principal witnesses against defendant were Lucy Cohen, the bookkeeper of the Manhattan branch of Mab Motors, Inc.; Clarisse Weill, the bookkeeper in the Bronx office; Harold Wolk and Harry Barrett, the two accountants employed by defendant, who had charge of Mab Motors' bookkeeping and audited the books about once a month; and Harry Hershey, sales tax auditor, employed in the Comptroller's office of the City of New York. The only evidence which connected defendant with the false

entries in the books of the company was the testimony of Wolk and Barrett. They had done all the actual accounting work for the corporation during the period involved and had prepared the fraudulent sales tax returns. Their testimony was that Felber had advised them to make the false entries.

The People do not charge that defendant received any of the tax money of which the City was defrauded, nor is there any proof that he was paid excessive fees for the accounting services he rendered to the corporation. Felber, who testified as a witness in his own behalf, disclaimed any knowledge of, or participation in, the larceny or the forgery and denied giving any improper instructions to Wolk or to Barrett.

[4] Prejudicial error is asserted by defendant in the court's instructions to the jury on the issue of corroboration of the testimony of Wolk and Barrett, it being argued that these two witnesses were accomplices. If, as the People claim, Wolk and Barrett were not accomplices of defendant, then any error in this regard would be harmless. However, we think it was at least a question of fact for the jury as to whether these two men were Felber's accomplices. With respect to the larceny charge, Wolk and Barrett had prepared the false sales tax returns and Wolk knew that the corporate defendant and its officers were withholding from the City the sales taxes collected. Barrett, who assumed Wolk's duties in connection with Mab Motors' books in February, 1938, was also aware that the City was not receiving all the sales taxes due it after the early part of 1938.

As to the forgery charge, whether Wolk and Barrett were accomplices of defendant was also a jury question. Section 889, subd. 4, of the Penal Law, which defines the

crime of forgery in the third degree, contains the following saving clause: "but this provision shall not apply to any clerk, bookkeeper, or other employee, who, without personal profit or gain, merely executes the orders of his employer." If the jury found that Wolk and Barrett had made false entries pursuant to orders from their employer without personal profit or gain, then they were not accomplices of the forgery and as to that crime their testimony implicating Felber required no corroboration. However, the jury might well have refused to believe that these two witnesses did not commit the forgery for their own personal profit or gain. In that event, they would be accomplices and their testimony would then require corroboration even as to the forgery.

[5, 6] Let us now examine the charge of the court upon this question. The trial court informed the jury that if they found Wolk and Barrett to be accomplices, the defendant could not be convinced on their testimony alone. Thereupon he correctly instructed them that "a conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime." § 399, Code of Criminal Procedure. The court then charged: "This other evidence which corroborates need not convince you by itself of the defendant's guilt beyond a reasonable doubt. The corroborating evidence must merely connect the defendant with the commission of the crime. To find the defendant guilty on any count, you must be convinced beyond a reasonable doubt from all the evidence of the guilt of the defendant. *Those books of Mab Motors, Inc., and the testimony of the bookkeepers employed by the corporation would be such evidence, if*

Appendix B—Opinions

Opinion of the Appellate Division, First Department, Reversing Petitioner's Conviction

you believe it." (Emphasis ours.) The meaning of the sentence emphasized was made plain by the following colloquy:

"Mr. Brodsky: Your Honor, I believe you charged that corroboration would be necessary, that if the jury found that Miss Weill and the books of the defendant corporation might furnish such corroborating evidence—did I understand you to say that? Am I wrong about it?

"The Court: I charged that the books and the testimony of the other witnesses may furnish such corroborating evidence.

"Mr. Brodsky: To which I except."

Thus the court advised the jury that the books of the company and the testimony of the bookkeepers might supply the necessary corroborative evidence of the testimony of Wolk and Barrett, if they were found to be accomplices. In so instructing the jury, we think the court erred.

The book entries were physical facts which no one disputed. Moreover, none of the entries was in defendant's handwriting and nothing disclosed by the books as such would tend to identify the defendant with the commission of the larceny or the forgery. This is likewise true of the testimony of the two bookkeepers, Miss Cohen and Miss Weill. Neither one testified that she had received from Felber any instructions to make false entries. All such directions to them came from Wolk and Barrett. Miss Weill at one point did state that she made entries which were false at the direction of either Mr. Wolk or Mr. Felber, but, as is now admitted, it was Wolk who had given such instructions. The People, with commendable frankness, concede that if "the jury were led to believe the

Appendix B—Opinions

Opinion of the Appellate Division, First Department, Reversing Petitioner's Conviction

corporate books and the testimony of the bookkeepers could be regarded as sufficient corroboration," then error was committed.

That such error is prejudicial is now well settled. *People* v. *Kress*, 284 N.Y. 452, 459, 460, 31 N.E.2d 898; *People* v. *Maione*, 284 N.Y. 423, 425, 31 N.E.2d 759; *People* v. *Feolo*, 284 N.Y. 381, 31 N.E.2d 496; *People* v. *Nitzberg*, 287 N.Y. 183, 38 N.E.2d 490, 188 A.L.R. 1253; *People* v. *Crum*, 272 N.Y. 348, 353, 6 N.E.2d 51. "Section 399 requires that an accomplice must in some degree be corroborated in his testimony that an accused was implicated in the commission of the crime. Evidence which merely shows that the crime was committed in the fashion described by an accomplice is not such corroboration." Loughran, *J.*, in *People* v. *Maione*, supra, 284 N.Y. at page 425, 31 N.E.2d 759. "But where the corroborative evidence standing alone has no real tendency to connect defendant with the commission of the crime, it is insufficient." Rippey, *J.*, *People* v. *Kress*, supra, 284 N.Y. at page 460, 31 N.E.2d at page 902.

It is suggested that the error may be overlooked because Wolk and Barrett were not accomplices and the jury must have so found. There is no basis in the record for such speculation. Upon the evidence and under the charge of the court, the jury was warranted in finding these two witnesses were accomplices. If it did so determine, and the People concede the jury may well have done so, corroboration of the accomplices' testimony was essential. *People* v. *Feolo*, supra, 284 N.Y. at pages 384, 385, 31 N.E.2d 496; *People* v. *Lazar*, 271 N.Y. 27, 2 N.E.2d 32.

Appendix B—Opinions

Opinion of the Appellate Division, First Department, Reversing Petitioner's Conviction

[7] The People also contend that requisite corroboration of the testimony of Wolk and Barrett is to be found in other testimony adduced upon the trial. Though we assume that there is such other evidence, there can be no escape from the conclusion that the jury in arriving at its verdict may have relied, solely, or, at least, in part, on those items of evidence which were incorrectly indicated in the charge as supplying the requisite legal corroboration. A conviction thus arrived at is improper and should be set aside. *People* v. *Maione,* supra; *People* v. *Markus,* 168 App.Div. 184, 186, 153 N.Y.S. 237.

The case was closely contested and the jury deliberated for many hours before arriving at its verdict There is no means of ascertaining what part the erroneous instruction complained of played in the jury's deliberations. A person charged with crime has the absolute right to be tried in conformity with law. Defendant, a certified public accountant and a member of the Bar, according to the character testimony, enjoyed a good reputation in the business and social community in which he has lived. There is no proof that he shared in any way in the fruits of the crimes admittedly committed by others. The felony convictions, with the serious consequences which attach to them, should not be permitted to stand unless defendant's guilt is established upon a trial free from substantial error.

For the foregoing reasons, the judgment of conviction should be reversed and a new trial ordered.

Judgment unanimously reversed and a new trial ordered. All concur.

Appendix B—Opinions

Excerpts from Report of Official Referee Recommending Denial of Petition for Reinstatement (pp. 4-6)

* * * *

"While the record of conviction stands the court in disciplining an attorney accepts that record and refuses to go back of it, and under subdivision 3 of section 88 and Section 477 he is disbarred, as a matter of course, and without a hearing or reference to inquire into the facts. But when the impediment—the record of conviction—is removed by a reversal and dismissal of the indictment, the range of scrutiny is as wide as it was at common law. The inquiry is not then confined only to the question of the guilt or innocence of the applicant with respect to the particular crime for which he was convicted.

"*Matter of Kaufman*, (supra). At pp. 430-431 the Court of Appeals said:

> "'Even innocence of the crime will not suffice if there has been a failure to live up to the standards of morality and honor.'

And also, at pp. 428, 429:

> "'No doubt the attorney seeking reinstatement has the burden of satisfying the court of his fitness to be restored to so honorable a fellowship.'

The court, by reason of the reversal herein, is not foreclosed from considering the acts upon which the indictment was had and conviction obtained, and the rule that the evidence adduced must prove the commission of a crime beyond a reasonable doubt has no application in this proceeding. It is entirely unnecessary to prove the commission of any crime. The court is not limited to a consideration of the applicant's conduct in connection with the transactions which were the basis for his indictment.

Appendix B—Opinions

Excerpts from Report of Official Referee Recommending Denial of Petition for Reinstatement

Any act of the applicant which has a bearing on his fitness to be a member of an honorable profession may be the subject of investigation and scrutiny in this proceeding."

* * * *

Regardless of whether the applicant was indicted or convicted or acquitted of a crime, the question that is presented for decision in this proceeding is, Has the Bar Association in opposition to the applicant's request for reinstatement, established, as it claims, that in the practice of his profession as an accountant he has been guilty of an act which shows that he does not possess the qualifications of honesty and integrity required of a member of the legal profession, and, therefore, he should not be reinstated? He now occupies the position as if his acts, which are the subject of the present inquiry, had occurred before his application for admission to the bar and had then been brought to the attention of the Committee on Character.

* * * *

Opinion of Appellate Division, First Department, Denying Petition for Reinstatement

IN RE FELBER.

Supreme Court, Appellate Division, First Department.

July 5, 1944.

PER CURIAM.

The petitioner has applied for reinstatement as a member of the Bar of this State. He was disbarred by an order of this court dated October 31, 1941, 262 App.Div.

1010, 30 N.Y.S.2d 498. That order was based on a certificate showing that on June 13, 1941, he had been convicted of two felonies in the Court of General Sessions of the County of New York. The conviction grew out of an indictment of the petitioner and nine others on thirty counts charging conspiracy, grand larceny by embezzlement and forgery in the third degree, as a result of which crimes more than $23,000 of sales taxes were embezzled from the City of New York. On May 8, 1942, this court (*People* v. *Felber*, 264 App.Div. 181, 34 N.Y.S.2d 609) reversed the judgment of conviction and ordered a new trial upon the ground that there was an error in the charge of the trial court.

Thereafter and on September 1, 1942, the indictment was dismissed in the Court of General Sessions on motion of the District Attorney. The petitioner then moved for reinstatement. The Association of the Bar of the City of New York filed objections to that application and this court referred the matter to Hon. Jacob Marks to take testimony and report thereon. The referee has now reported that, in his opinion, "it has been established that in the years 1936, 1937 and 1938, for the purpose of enabling the Mab Motors, Inc., a corporation by whom he was employed as an accountant, to defraud the City out of sums due for sales taxes, the applicant gave instructions to enter, as loans payable and loans receivable in the books of the corporation used by it in its main place of business in the Borough of the Bronx, the amounts of taxes collected from purchasers at the branch place of business of the corporation in the Borough of Manhattan, checks for which amounts of sales taxes were transmitted by the Manhattan branch of the corporation to the main office of the corporation in the Borough of the Bronx;

and that he also instructed his assistants that in making up tax reports required by the City to be filed quarter yearly, to conceal the fact in such reports that any amount was due for sales tax on purchases made in the Manhattan branch, and in making up such reports to state that the total amount of sales made by the corporation in all its branches in each quarter year was only the amount of sales made by the corporation at its principal place of business, its Bronx branch. That the instructions so given by the applicant were carried out and the false entries made in loans payable and loans receivable as directed by the applicant, and the tax reports also made and filed with the City for each of the quarter years commencing with the quarter year ending October 1, 1936, and up to the quarter year ending October 1, 1938, as directed by the applicant. That as a result of such fraud it was discovered by a city auditor who made an investigation of the books of the corporation in June, 1939, that the officers of the corporation had embezzled upwards of Twenty-three thousand dollars of sales taxes that should have been paid to the City during the periods above mentioned."

The record before this court not only sustains the findings of the Official Referee, but it clearly demonstrates that the petitioner is unfit for membership in the legal profession.

The application for reinstatement should be denied.

Application denied. Order filed.

APPENDIX C

Excerpts from Petition for Reinstatement Raising Federal Constitutional Questions

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application

of

SIDNEY FELBER

For Reinstatement to the Bar

PETITION

State of New York,
County of New York—ss.:

SIDNEY FELBER, being duly sworn, deposes and says:

I am the petitioner in the above-entitled proceedings and am personally familiar with the facts hereinafter stated, which are to my knowledge truly and faithfully represented.

This is my fifth petition for reinstatement since the disbarment order of October 31, 1941. However, it differs essentially from the other four in that for the first time it points out material violations of my constitutional rights in the light of principles established by the United States Supreme Court, now that I have become aware of them.

Appendix C—Excerpts from Petition for Reinstatement Raising Federal Constitutional Questions

The case of *Rudolph Schware, Petitioner* v. *Board of Bar Examiners of the State of New Mexico,* No. 92, Argued January 14, 15, 1957, Decided May 6, 1957, 353 U. S. 232, is in point:

> Proceeding on original petition to review denial by State Board of Bar Examiners of application to take examination to practice law. The Supreme Court of the State of New Mexico, 60 N. M. 304, 291 P. 2nd 607, denied application to take bar examination and certiorari was granted by the United States Supreme Court. The Supreme Court, Mr. Justice Black, held that under the circumstances the applicant's past membership in Communist Party and his prior arrest record and use of aliases could not be said to raise substantial doubts about his present good moral character, and refusing him the right to qualify for practice of law constituted a denial of due process.
>
> Reversed and remanded with directions.

* * * *

Then there is the case of *Raphael Konigsberg, Petitioner* v. *The State Bar of California* and the Committee of Bar Examiners of the State Bar of California, No. 5, Argued January 14, 1957, Decided May 6, 1957, Rehearing Denied June 17, 1957, See 354 U. S. 927, 77 S. Ct. 1374:

> Proceeding on application by petitioner for admission to State Bar of California. The Supreme Court of California affirmed action of State Committee of Bar Examiners in refusing certification. The Supreme Court granted certiorari. The Supreme Court, Mr. Justice Black, held that there was no evidence in the record which rationally justified a finding that petitioner had failed to establish his good character or failed to show that he did not advocate forceful over-

throw of the government, even though he refused to answer questions as to his political association.

Reversed and remanded.

On page 725 the United States Supreme Court stated:

"* * * While this is not a criminal case, its consequences for Konigsberg take it out of the ordinary run of civil cases. The Committee's action prevents him from earning a living by practicing law. The deprivation has grave consequences for a man who has spent years of study and a great deal of money in preparing to be a lawyer."

Specifically, these are the legal grounds justifying reinstatement:

1. Violation of the Fourteenth Amendment in the failure to have my right to practice law restored upon reversal by this Court of the felony conviction which had automatically caused disbarment. Also, violation of the Fourteenth Amendment in the forfeiting of my right to have discipline administered on all the circumstances.

2. Violation of the Fourteenth Amendment in subjecting me to a second trial when on the same facts not involving legal practice, I had been judicially absolved by judgment of General Sessions.

3. Discriminatory discipline inflicted on me—even on the erroneous assumption of guilt—constituting a violation of the Fourteenth Amendment.

Disbarment did not come about in the usual manner: breach of legal ethics, hearings initiated in disciplinary proceedings and a subsequent determination of guilt

Appendix C—Excerpts from Petition for Reinstatement Raising Federal Constitutional Questions

therein. Disbarment was automatic following a judgment of conviction against me in the Court of General Sessions, New York County, on a felony conviction. The judgment of conviction was later unanimously reversed by this Court. A few months later the indictment under which I had been tried, was, on recommendation of the district attorney, dismissed in General Sessions.

* * * *

The indictment against me was dismissed on September 19, 1942. I applied for reinstatement immediately thereafter. However, instead of being reinstated at once as I should have been, my application was opposed by the Bar Association on the question of guilt or innocence which had already been litigated at the criminal trial and ruled on finally by the Court of General Sessions. The opposition to my application was an illegal denial of my basic rights which had been restored to me by this Court when it reversed the judgment of conviction. I did not at the time (as will now be done) present the law and the facts substantiating these conclusions. I respectfully submit that had I done so, the objection to my reinstatement would have been ordered struck down and my application granted.

Instead, an official referee was duly appointed to hear and report. He proceeded to hold legally unjustifiable hearings concerned with a redetermination of the issues on evidence already disposed of by General Sessions and came to a decision directly in conflict with the judgment of General Sessions—a violation of the Fourteenth Amendment.

Then, too, these proceedings caused the improper forfeiture of my right to have discipline considered on all the circumstances—another violation of the Fourteenth Amendment. I have devoted much effort in previous petitions to

show how completely the referee misjudged the evidence given in the hearings. Considering the basic illegality of all the proceedings before the referee, a disclosure of the grave errors in his report would seem to be unnecessary. However, although I have ample legal grounds, I will not rest on these alone for exoneration. I have constantly insisted that a careful, meticulous review of the evidence and all the circumstances would result in indicating my innocence. It would also reveal how seriously the referee erred in his findings. It is on these considerations, apart from the legal grounds, that I respectfully submit I am entitled to full vindication. The referee's report, including the accompanying factors, will be gone into briefly later.

* * * *

In other words, I did not have the burden of proving my innocence as a condition precedent to my being readmitted (reinstatement being my unencumbered right as a result of the reversal of conviction by this Court). If there were to be any hearings at all (they were illegal in the first place), I should have been in the position of an attorney in good standing with the advantage of the presumption of innocence and all the other rights which had been restored to me.

* * * *

In my case, too, there was the unlawful conviction with the stigma of guilt unremoved by the elimination of the conviction. Then, "* * * First he punisheth and then he heareth *** *;" How apt is this quotation from the above! What happened to me was clearly a violation of the Fourteenth Amendment.

* * * *

I respectfully submit, therefore, that there was a violation of the Fourteenth Amendment in subjecting me to

Appendix C—Excerpts from Petition for Reinstatement Raising Federal Constitutional Questions

a second trial on the same facts solely on charges concerning matters apart from the practice of law, of which I had been absolved by a criminal court.

* * * *

By its decisions in the *Schware* and *Konigsberg* cases, *supra,* the United States Supreme Court served notice that the right to practice law is important enough to warrant protection under the Fourteenth Amendment. This principle was applied in cases where merely the right to qualify to practice was involved. Of how much greater consequence is the right of an established attorney to be able to continue in his profession and not to be prevented therefrom by discriminatory treatment! This right, of course, is subject to any discipline which may be imposed for a crime or ethical offense. However, there cannot possibly be a forfeit of an attorney's right to practice simply because of the commission of any offense regardless of gravity so as to leave the attorney destitute of the protection of the Fourteenth Amendment. This is implicit in the assertion of the United States Supreme Court in the *Schware* case, *supra*: "Certainly the practice of law is not a matter of the State's grace."

An offending attorney, therefore, has the right to have discipline administered according to the nature of his offense pursuant to the standards set up for that purpose, taking into account other factors such as prior record, reputation, etc. The standards of this Court are to be found, of course, in its decisions which will be presented and discussed hereinafter.

The point is that despite my good reputation I was inflicted with the severest of all punishments, perpetual banishment from the legal profession, while lesser discipline varying from censure to limited suspension was imposed in comparable cases (as will be brought out later),

constituting a grave violation of the Fourteenth Amendment relating to due process and equal protection of the laws.

* * * *

APPENDIX D

Orders in This Proceeding

Order of Appellate Division, First Department, Denying Present Petition for Reinstatement

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 3rd day of February, 1966.

Present—Hon. Bernard Botein, *Presiding Justice*,
" Charles D. Breitel,
" Francis L. Valente,
" Samuel W. Eager,
" Aron Steuer,
Justices.

4

In the Matter
of
Sidney Felber,
an Attorney.

An order of this Court having been made and entered herein on the 31st day of October, 1941, disbarring the

Appendix D—Orders in This Proceeding

Order of Appellate Division, First Department, Denying Present Petition for Reinstatement

above-named respondent, Sidney Felber, from practice as an attorney and counselor-at-law in the State of New York,

And the said respondent having moved for an order reinstating him as an attorney and counselor-at-law in the State of New York,

Now, upon reading and filing the notice of motion, dated November 1, 1965, with proof of due service thereof, and the petition of Sidney Felber, duly sworn to the 1st day of November, 1965, in support of said motion, and the affidavit of Michael Franck, duly sworn to the 22nd day of December, 1965, and the reply affidavit of Sidney Felber, duly sworn to the 17th day of January, 1966, and after hearing Mr. H. Gardner Ingraham for the motion, and Mr. Michael Franck, attorney for the Committee on Grievances of The Association of the Bar of the City of New York; and due deliberation having been had thereon, it is hereby unanimously

ORDERED that the said motion be and the same hereby is denied.

ENTER:

HYMAN W. GAMSO
Clerk.

Appendix D—Orders in This Proceeding

Order of Appellate Division, First Department, Denying Present Petition for Reinstatement

APPELLATE DIVISION—SUPREME COURT

FIRST DEPARTMENT

STATE OF NEW YORK

I, HYMAN W. GAMSO, Clerk of the Appellate Division of the Supreme Court, First Judicial Department, do hereby certify that I have compared this copy with the original thereof filed in said office on Feb 3 1966 and that the same is a correct transcript thereof, and of the whole of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on Feb 7 1966.

HYMAN W. GAMSO
Clerk.

Appendix D—Orders in This Proceeding

Order of Court of Appeals Granting Motion to Dismiss Appeal

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Fifth day of May A. D. 1966.

Present,

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

1 Mo. No. 464

In the Matter of the Application of SIDNEY FELBER, for Reinstatement to the Bar,

Appellant.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed upon the ground that

Appendix D—Orders in This Proceeding

Order of Court of Appeals Granting Motion to Dismiss Appeal

the order appealed from does not finally determine the proceeding within the meaning of the Constitution.

A copy

GEARON KIMBALL
Deputy Clerk

(SEAL)

Appendix D—Orders in This Proceeding

Order of Appellate Division, First Department, Denying Motion for Reargument or for Leave to Appeal to Court of Appeals

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 7th day of July, 1966.

Present—Hon. Bernard Botein, *Presiding Justice*
" Charles D. Breitel,
" Harold A. Stevens,
" Samuel W. Eager,
" Aron Steuer, *Justices*

In the Matter of the Application

of

Sidney Felber

For Reinstatement to the Bar.

The above named petitioner, Sidney Felber having moved for leave to reargue Motion No. 4 of January 5, 1966, wherein petitioner moved for reinstatement to the Bar, and which motion was denied by order of this Court entered on February 3, 1966, or, in the alternative, for leave to appeal to the Court of Appeals, and amending the aforesaid order of this Court,

Now, upon reading and filing the notice of motion, dated June 4, 1966, with proof of due service thereof, and the affidavits of Morton L. Ginsberg, sworn to the 3rd day of June, 1966 and the 21st day of June, 1966, in support

Appendix D—Orders in This Proceeding

Order of Appellate Division, First Department, Denying Motion for Reargument or for Leave to Appeal to Court of Appeals

of said motion, and the affidavit of Peter J. O'Connor, sworn to the day of June, 1966, in opposition thereto, and after hearing Mr. Morton L. Ginsberg for the motion, and Mr. John G. Bonomi, attorney for The Association of the Bar of the City of New York, opposed,

It is hereby unanimously ordered that the said motion be and the same is hereby denied in all respects.

Enter:

FRANK H. CRABTREE
Deputy Clerk.

APPELLATE DIVISION—SUPREME COURT—FIRST DEPARTMENT
STATE OF NEW YORK

I, HYMAN W. GAMSO, Clerk of the Appellate Division of the Supreme Court, First Judicial Department, do hereby certify that I have compared this copy with the original thereof filed in said office on Jul 7 1966 and that the same is a correct transcript thereof, and of the whole of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on Jul 7 1966.

HYMAN W. GAMSO
Clerk

(SEAL)

Appendix D—Orders in This Proceeding

Order of Court of Appeals Denying Motion for Leave to Appeal Thereto

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twentieth day of October A. D. 1966.

Present, HON. CHARLES S. DESMOND, *Chief Judge*, presiding.

1 Mo. No. 829

In the Matter of

the Application of SIDNEY FELBER, For Reinstatement to the Bar.

SIDNEY FELBER,

Appellant,

THE BAR ASSOCIATION OF THE CITY OF NEW YORK,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix D—Orders in This Proceeding

Order of Court of Appeals Denying Motion for Leave to Appeal Thereto

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution.

A copy

GEARON KIMBALL
Deputy Clerk

(SEAL)

Office-Supreme Court, U.S.
FILED
MAR 17 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~988~~ 981

SIDNEY FELBER,

Petitioner,

—against—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF FOR RESPONDENT

JOHN G. BONOMI
Attorney for Respondent
The Association of the Bar
of the City of New York
36 West 44th Street
New York, N. Y. 10017

PETER J. O'CONNOR
Of Counsel

TABLE OF CONTENTS

PAGE

Statement 1

Opinions Below 2

The Questions Involved 3

Constitution and Statutes 3

The Facts 4

POINT I:

The petition for certiorari fails to set forth any meritorious claim of violation of constitutional rights; accordingly certiorari should be denied 9

CONCLUSION 14

TABLE OF AUTHORITIES

Cases:

Fox Film Corp. v. Muller, 296 U. S. 207 (1935) 14

Harris v. United States, 382 U. S. 162 (1965) 10, 11

Kent v. United States, 383 U. S. 541 (1966) 10, 11

Konigsberg v. The State Bar of California, 353 U. S. 252, reh. den. 354 U. S. 927 (1957) 10, 11

Wall, Ex Parte, 107 U. S. 265 11

PAGE

Constitution:

Constitution of the United States

Fourteenth Amendment 3

Statutes:

New York Judiciary Law

Section 90, Subdivision 4 ..... 4, 5, 9

Section 90, Subdivision 5 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 988

SIDNEY FELBER,

Petitioner,

—against—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

BRIEF FOR RESPONDENT

Statement

This petition for a writ of certiorari to the Appellate Division of the New York Supreme Court, First Judicial Department, seeks review of an order of that Court, entered February 3, 1966, denying petitioner's motion for an order reinstating him as an attorney and counselor-at-law in the State of New York. Petitioner was disbarred by the Appellate Division on October 31, 1941.

On May 5, 1966, the New York Court of Appeals dismissed petitioner's appeal to that Court as of right on the ground

that the order denying reinstatement did not finally determine the proceeding within the meaning of the New York Constitution.

Petitioner's motion addressed to the Appellate Division for leave to appeal to the Court of Appeals from the order of February 3, 1966, was denied on July 7, 1966. The Appellate Division, in addition to denying leave to appeal, denied petitioners' application for an order amending the February 3, 1966, order to provide "that petitioner's claimed violation of his rights pursuant to the Fourteenth Amendment of the Constitution of the United States were presented and necessarily passed upon . . ."

On October 20, 1966, the New York Court of Appeals dismissed petitioner's motion for leave to appeal to that Court on the ground that the order appealed from did not finally determine the proceeding within the meaning of the State Constitution.

Opinions Below

The decision of the Appellate Division denying, without opinion, petitioner's motion for reinstatement is reported at 25 App. Div. 2d 509. The memorandum decision of the Court of Appeals dismissing petitioner's appeal is reported at 17 N. Y. 2d 806.

The decision of the Appellate Division denying petitioner's application for leave to appeal has not yet been officially reported.

The memorandum decision of the Court of Appeals dismissing petitioner's motion for leave to appeal to that Court is reported at 18 N. Y. 2d 800.

The Questions Involved

1. Where an attorney is automatically disbarred upon his conviction of a felony and that conviction is reversed and the indictment thereunder thereafter dismissed by the trial court, did New York deny him due process of law by refusing to reinstate him when, upon a hearing on his motion for reinstatement, professional misconduct on his part was established by respondent?

2. Should petitioner have review in this Court of a twenty-six year old order of disbarment when he failed to raise questions now urged by him at the time of the original proceedings?

3. In view of petitioner's failure to urge the questions now contended for by him during the original proceedings twenty-six years ago and in light of the Appellate Division's refusal to amend the order denying reinstatement—review of which is here sought—to state that constitutional questions were presented and necessarily passed upon, does the order rest upon adequate and independent non-federal grounds, thereby precluding this Court from reviewing that order?

Constitution and Statutes

Constitution of the United States
Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Judiciary Law of the State of New York

Section 90. Admission to and removal from practice by appellate division.

4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.

Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys.

5. Upon a reversal of the conviction for felony of an attorney and counsellor-at-law, or pardon by the president of the United States or governor of this state, the appellate division shall have power to vacate or modify such order or debarment.

The Facts

On June 17, 1941, the petitioner was convicted, after a trial by jury, of the crimes of grand larceny in the first degree and forgery in the third degree. On October 31, 1941, pursuant to the provisions of Subdivision 4 of Section 90 of the New York Judiciary Law, petitioner was disbarred by order of the Appellate Division on the basis of his convic-

tion of a felony. Subdivision 4 of Section 90 reads as follows:

> "4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such."

On May 8, 1942, the Appellate Division reversed petitioner's conviction and ordered a new trial [*People* v. *Felber,* 264 App. Div. 181 (1st Dept. 1942)] because of erroneous instructions given by the trial judge to the jury. Thereafter, on September 1, 1942, the District Attorney of New York consented to a reversal of the indictment upon which the conviction had been based.

The petitioner then moved for reinstatement. The Appellate Division appointed an Official Referee to take testimony relative to the application and to report to the Court thereon. Hearings were held by the referee on May 6, 12, June 24 and November 1, 1943, at the conclusion of which, he filed his report, dated February 16, 1944.

The referee, in his report noted that petitioner, *inter alia,* contended

> "Secondly, that those acts and the issues involved growing out of that relationship have been decided by a criminal court in favor of the applicant. That there is no authority for withholding his reinstatement when the order disbarring him was based upon a certificate showing he had been convicted of a felony not arising out of or involving any act as an attorney at law, which conviction was later reversed and the indictment dis-

missed, thus finally acquitting him of criminal responsibility. That having thus been finally acquitted and being innocent of crime he questions the power of the court to reexamine and consider evidence which was declared to be insufficient to convict of a crime and which does not involve the applicant in any misconduct in his practice as an attorney at law."

The referee then analyzed these contentions and, upon the basis of New York law, rejected them. The referee thereupon stated:

"Regardless of whether the applicant was indicted or convicted or acquitted of a crime, the question that is presented for decision in this proceeding is: Has the Bar Association in opposition to the applicant's request for reinstatement, established, as it claims, that in the practice of his profession as an accountant he has been guilty of an act which shows that he does not possess the qualifications of honesty and integrity required of a member of the Legal profession and, therefore, he should not be reinstated?"

After a painstaking analysis of the evidence presented at the hearings, the referee concluded

"In my opinion it has been established that in the years 1936, 1937 and 1938, for the purpose of enabling the Mab Motors, Inc., a corporation by whom he was employed as an accountant, to defraud the City out of sums due for sales taxes, the applicant gave instructions to enter, as loans payable and loans receivable in the books of the corporation used by it in its main place of business in the Borough of the Bronx, the

amounts of taxes collected from purchasers at the branch place of business of the corporation in the Borough of Manhattan, checks for which amounts of sales taxes were transmitted by the Manhattan branch of the corporation to the main office of the corporation in the Borough of the Bronx; and that he also instructed his assistants that in making up tax reports required by the City to be filed quarter yearly, to conceal the fact in such reports that any amount was due for sales tax on purchases made in the Manhattan branch, and in making up such reports to state that the total amount of sales made by the corporation in all its branches in each quarter year was only the amount of sales made by the corporation at its principal place of business, its Bronx branch. That the instructions so given by the applicant were carried out and the false entries made in loans payable and loans receivable as directed by the applicant, and the tax reports also made and filed with the City for each of the quarter years commencing with the quarter year ending October 1, 1936 and up to the quarter year ending October 1, 1938, as directed by the applicant. That as a result of such fraud it was discovered by a city auditor who made an investigation of the books of the corporation in June, 1939, that the officers of the corporation had embezzled upwards of Twenty-three thousand dollars of sales taxes that should have been paid to the City during the periods above mentioned."

The Appellate Division confirmed the referee's report (268 App. Div. 156) stating:

> "The record before this court not only sustains the findings of the Official Referee, but it clearly demonstrates that the petitioner is unfit for membership in the legal profession."

Since the Appellate Division's denial of the aforementioned petition for reinstatement, petitioner has unsuccessfully made four additional motions for reinstatement—the denial of the last of which is the subject of the present petition for certiorari.

In the present motion for reinstatement, petitioner urged that his reinstatement was justified because

> "1. Violation of the Fourteenth Amendment in the failure to have my right to practice law restored upon reversal by this Court of the felony conviction which had automatically caused disbarment. Also, violation of the Fourteenth Amendment in the forfeiting of my right to have discipline administered on all the circumstances.
>
> 2. Violation of the Fourteenth Amendment in subjecting me to a second trial when on the same facts not involving legal practice, I had been judicially absolved by judgment of General Sessions.
>
> 3. Discriminatory discipline inflicted on me—even on the erroneous assumption of guilt—constituting a violation of the Fourteenth Amendment."

The denial of this latest application and the subsequent appellate proceedings in the New York Courts have already been described (*supra*, pp. 1-2).

POINT I

The petition for certiorari fails to set forth any meritorious claim of violation of constitutional rights; accordingly certiorari should be denied.

Approximately twenty-five years ago, petitioner was disbarred following his conviction for a felony, pursuant to the provisions of Subdivision 4 of the New York Judiciary Law. After the reversal of his conviction and the subsequent dismissal of the indictment by the trial court, petitioner moved for reinstatement. The Appellate Division appointed an Official Referee to hear and report. The Referee took testimony at hearings, during which petitioner was represented by counsel, and, at the conclusion, reported to the Appellate Division that the objections filed by respondent had been sustained by the evidence. The Appellate Division confirmed the Referee's report and denied the motion for reinstatement.

The record thus demonstrates that petitioner's continued disbarment after reversal of his conviction rested not on arbitrary action of the State of New York as petitioner now contends but rather upon evidence of misconduct presented to and passed upon by the Appellate Division (*cf.*, Petition, pp. 16-18).

At the hearings before the Referee, it is clear that respondent had the burden of establishing petitioner's misconduct and that the Referee and the Appellate Division found that the burden had been met. In short, although petitioner was not automatically reinstated upon reversal of his conviction, his continued disbarment rests on affirmative evidence of misconduct presented at the hearing on his first motion for reinstatement.

It is equally clear that petitioner's contention that he was deprived of his presumption of innocence in the reinstatement proceeding lacks merit (Petition, pp. 19-20). This is so in view of the Referee's specific recognition that the issue was whether respondent had sustained its objections to petitioner's reinstatement and his findings that its objections had been sustained by the evidence presented.

Significantly, petitioner urges that, upon the reversal of his conviction, he should have been relieved of the disbarment " . . . subject to any disciplinary proceedings which the Association of the Bar might have seen fit to bring based on the facts which had given rise to the conviction. In the latter event, petitioner would have stood before the law as any attorney, accused *de novo,* of wrongdoing" (Petition, p. 18). This contention might have some merit had petitioner been required to bear the burden of proving his innocence of charges of professional misconduct but, as demonstrated, upon the hearing of the motion for reinstatement it was the respondent, not the petitioner, which had the burden of proof on that issue.

In this connection, petitioner contends that, in disciplinary proceedings, the State should be required to prove guilt therein by a higher standard of proof than by a preponderance of the evidence. (Petition, pp. 20-21) In so urging the point, he cites three cases decided by this Court: *Harris* v. *United States,* 382 U. S. 162 (1965); *Kent* v. *United States,* 383 U. S. 541 (1966); *Konigsberg* v. *The State Bar of California,* 353 U. S. 252, *reh. den.* 354 U. S. 927 (1957).

These cases, it is submitted, do not support petitioner's argument concerning the burden of proof in disciplinary

proceedings which are civil in nature rather than criminal, *Ex Parte Wall*, 107 U. S. 265, 288. In *Harris*, the Court reversed an order of a Federal District Judge holding a grand jury witness in summary contempt for refusal to answer questions before a grand jury on the ground that the contempt, if any, was before the grand jury and not the Court. In *Kent*, this Court held, on the facts of that case, that a Juvenile Court's waiver of jurisdiction over the youth there involved and remitting him for trial in the United States District Court where he was subsequently indicted violated principles of due process. The Court reached this conclusion because of the Juvenile Court's failure to accord the youth a hearing and failure to allow counsel access to that Court's records concerning the case.

In the third case cited by petitioner, *Konigsberg*, there was involved an order of the Supreme Court of California which had refused a candidate admission to the state bar on the ground that he had failed to establish his good moral character and to prove that he did not advocate overthrow of the federal and state governments by unconstitutional means. This Court reversed and held that the applicant's due process rights had been violated because his membership in the Communist Party in 1941, his criticism of public officials and his refusal to answer questions concerning his political opinions could not rationally support a conclusion of bad character.

The petitioner further contends that the procedure by which he was disbarred denied him equal protection of the laws in three respects (Petition, pp. 21-23). His claims lack merit.

The first contention, in this regard, is that, because of his automatic disbarment, the Appellate Division, upon confirming the referee's report in the reinstatement proceeding, had no discretion to impose a discipline less than disbarment (Petition, p. 21). This proposition, however, has no support in New York law. Subdivision 5 of Section 90 of the New York Judiciary Law grants to the Appellate Division the power in cases where the felony conviction is reversed to ". . . . vacate or modify such order or debarment [sic]". Under this statutory provision, in the case at bar, the Appellate Division could have imposed a less severe discipline than it did but, from what has been already said, it exercised its discretion against lessening the discipline predicated on the evidence of misconduct presented to its Referee at the hearing on the application for reinstatement.

Petitioner argues that New York's automatically disbarring attorneys upon a felony conviction and refusing automatic reinstatement upon reversal of the conviction but not doing so where members of other professions, e.g. medicine, are similarly circumstanced violates the equal protection of the laws provision of the Federal Constitution (Petition, p. 23). Although it is true as petitioner claims that there is here a differentiation in treatment, there is a reasonable basis therefor. A lawyer is an officer of the court, and, as such, is intimately involved in the administration of not only civil justice but of criminal justice as well. It is thus perfectly understandable and rational that an officer of the court upon being convicted of a grave violation of the state's criminal law—a felony—should be prevented from further participation as a minister of the laws of which he has been convicted of transgressing and that, in

cases where the conviction has been reversed, the courts should have the opportunity to determine all the facts before reinstatement. On the other hand, these reasons do not apply to the other professions such as medicine.

Lastly, petitioner claims New York's affording the right to apply for leave to appeal to the New York Court of Appeals from an order of disbarment but denying such right where an order denying reinstatement is involved is violative of equal protection (Petition, pp. 21-2).

This argument is likewise without merit. Petitioner, certainly, could have appealed to the New York Court of Appeals as of right from the order of disbarment, upon a claim of a constitutional question or, at the very least, have applied for leave to appeal to that Court from that order. At that time, he could have urged his claims vis-a-vis the unconstitutionality of the automatic disbarment provision of the New York Judiciary Law. In addition, he could have raised but did not do so, the questions he now raises, upon his first motion for reinstatement and if rejected by the Appellate Division, and upon dismissal by the New York Court of Appeals of his application for leave to appeal, could have sought review by this Court of the questions he now asserts. In short, viewed realistically, petitioner seeks review by this Court of judicial determinations made approximately twenty-six years ago. The time for review of the questions he now raises was then and not now.

In this connection, although the Appellate Division in denying the instant motion for reinstatement, wrote no opinion, it nevertheless later denied a motion by petitioner to amend its order so as to state that constitutional questions were presented and necessarily passed upon in its

denial of reinstatement. The import of the Appellate Division's refusal to amend the order in question is that it denied petitioner's motion for reinstatement on the ground that the claims now urged by him were untimely raised since they could have been—but were not—urged in the proceedings twenty-six years ago. The order of the Appellate Division, it is submitted thereby rests on an adequate and independent non-federal ground and is, therefore, not reviewable by this Court [See *Fox Film Corp.* v. *Muller*, 296 U. S. 207 (1935)].

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

JOHN G. BONOMI
Attorney for Respondent
The Association of the Bar
of the City of New York
36 West 44th Street
New York, N. Y. 10017

PETER J. O'CONNOR
Of Counsel

March, 1967

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 12 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 981

SIDNEY FELBER,

Petitioner,

against

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

PHILIP J. RYAN,
Attorney for Petitioner,
660 Madison Avenue,
New York, N. Y. 10022.

MORTON L. GINSBERG,
Of Counsel.

INDEX

	PAGE
Preliminary Statement	1
ARGUMENT:	
POINT I.—The probability, or even the possibility, of the violation of petitioner's right to due process of law is sufficient ground for this Court to grant the petition	4
POINT II.—The special responsibilities and obligations of an attorney to the Court did not justify the denial to petitioner of the equal protection of the laws	5
POINT III.—The major question raised in the instant petition could not have been raised on appeal from the original order of disbarment and is timely raised	7
CONCLUSION	10
Certificate Pursuant to Rule 58	11

CASES CITED

Estes v. Texas, 381 U. S. 532 (1964)	5
Matter of Gondelman, 20 A. D. 2d 805 (1964)	9
Matter of Robson, 284 A. D. 804 (1954)	9

PAGE

Sheppard v. Maxwell, 384 U. S. 333 (1965) 2, 5, 9

Spevak v. Klein, 385 U. S. 511 (1967) 5, 9

Tumey v. Ohio, 273 U. S. 510 5

United States v. Morgan, 346 U. S. 502 (1953) 9, 10

United States v. Morgan, 222 F. 2d 673 (2d Cir. 1955) 9, 10

Woodby v. Immigration and Naturalization Service, 385 U. S. 276 (1966) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 981

SIDNEY FELBER,

Petitioner,

against

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner prays that upon rehearing a Writ of Certiorari issue to review an Order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, denying his petition for reinstatement to the Bar of the State of New York.

Preliminary Statement

Pursuant to Rule 58 of the Rules of this Honorable Court, no attempt will be made herein to reiterate, or to elaborate upon, the grounds urged in support of the petition for certiorari. We respectfully submit that the dissent herein has succinctly and forcefully demonstrated the

respects in which petitioner's rights pursuant to the Fourteenth Amendment have been manifestly violated.

The objective of this petition is to demonstrate that not only has petitioner been the innocent victim of that which could only have occurred through the unconstitutional procedure employed, but also that the effect of now denying to him redress of the incalculable and most severe detriment which he has suffered, may be to permit continuing and future deprivations of such rights through possibly similar procedures which are as manifestly inadequate to safeguard the rights of professional persons who are accused of wrongdoing. Although reversals are only "palliatives", *Sheppard* v. *Maxwell,* 384 U. S. 333, 363 (1965), no "remedial measures that will prevent the prejudice at its inception" (*ibid.*) will ever be considered if the result of the prejudicial proceeding is permitted to stand.

Although the petition for certiorari herein did not attempt to argue from the evidence, scrutiny of the transcript before the Official Referee in the reinstatement proceeding (filed in this Court) leads to the inescapable conclusion that petitioner was denied reinstatement because the Referee believed the testimony of petitioner's two ex-employees that petitioner instructed them to commit the fraud of which petitioner was erroneously convicted (See page 13 of the petition), and that he disbelieved petitioner. No further material corroboration of their testimony is to be found in the reinstatement proceeding than was held to have rendered petitioner's criminal conviction fatally defective (10a). Moreover, these

two witnesses were obviously highly interested in transferring the onus for the crime of which they were accused from their shoulders to petitioner. Significantly, their indictments were dismissed without trial as a result of their testimony against petitioner despite their admitted guilt (See page 8 of the petition herein).

The sole truly disinterested evidence was uncovered and brought to light in petitioner's second petition for reinstatement, through the affidavit of Mr. Lasker, who had direct and personal knowledge of the facts, and no reason to color his testimony in petitioner's behalf. As set forth at page 12 of the petition, the excerpt from his affidavit firmly and unequivocally demonstrates petitioner's innocence. It is indeed arguable that the failure of the New York Courts to grant a new hearing upon this newly discovered evidence amounted to such an abuse of discretion so as to constitute a denial of due process of law. Significantly, respondent recommended reconsideration of "the extent of punishment imposed" at that point (See pages 12-13 of the petition).

In any event, the purpose of now inspecting the relevant evidence involved is to demonstrate that, upon the basis of all of the credible evidence now in the record, petitioner was clearly innocent of any wrongdoing whatsoever. Yet, by virtue of the misplacing upon him of the burden of proof (13a), the result was that he was disbarred for life. The denial of certiorari in this case, it is respectfully submitted, permits the continuation of not only the procedure complained of but also implies that other safeguards inherent in the concept of due process

of law, may be less than strictly afforded and adhered to by the States in disciplinary proceedings.

In view of the foregoing, and for the reasons set forth in the dissent, it is respectfully submitted that certiorari should be granted herein. Inasmuch as the decision herein was handed down while petitioner's reply brief was being printed, what follows is the substance thereof, which, we respectfully submit, contains both complete responses to the points made by respondent, as well as substantial grounds available to petitioner although not previously presented.

ARGUMENT

POINT I

The probability, or even the possibility, of the violation of petitioner's right to due process of law is sufficient ground for this Court to grant the petition.

Although the quotation from the referee's report denying reinstatement, (See brief of respondent, at page 6) ambiguously stated that respondent was required "in opposition" to establish the guilt of petitioner, the following sentence, set forth in full at page 13a of the appendix, clearly indicates that the referee conceived that petitioner bore the same burden as is imposed initially upon any applicant for admission to the Bar to demonstrate his character and fitness. Morover, the citation by the Referee (12a) of the authorities holding that petitioners generally have the burden of proof in reinstatement pro-

ceedings indicates that the same was misplaced upon petitioner.

It is, therefore, probable that petitioner bore the burden of proof in the reinstatement proceeding. Even if there existed any possibility that any rights guaranteed by the Fourteenth Amendment have been denied, a new proceeding is in order. *Estes* v. *Texas,* 381 U. S. 532, 542 (1964); *Tumey* v. *Ohio,* 273 U. S. 510, 532 (1927); *Sheppard* v. *Maxwell, supra,* at 352 (1965).

It is difficult to accept that an alien cannot be deported in the absence of clear, unequivocal and convincing evidence of his wrongdoing, *Woodby* v. *Immigration and Naturalization Service,* 385 U. S. 276 (1966), while an attorney may be disbarred for life through a procedure whereby it is probable that he himself bore the burden of proving his innocence. Disbarment proceedings are even closer to criminal prosecutions in their nature and effect (*Id,* at 285) than deportation proceedings and yet petitioner's disbarment was predicated upon *less* than "no higher degree of proof than applies in a negligence case." *Ibid.*

POINT II

The special responsibilities and obligations of an attorney to the Court did not justify the denial to petitioner of the equal protection of the laws.

As this Court recently recognized in *Spevak* v. *Klein,* 385 U. S. 511 (1967), the privilege against self-incrimination applies to a lawyer despite the special responsibilities

which a lawyer bears as an officer of the Court. This Court therein held that "lawyers also enjoy first-class citizenship." 385 U. S. at 516.

There can be no question that the lawyer's special duties or responsibilities, as the dissent herein correctly held, do not justify the types of discrimination inherent in the procedure of which the petitioner now complains. First, the automatic disbarment itself cannot be justified prior to the exhaustion of all appellate rights from the conviction.*

Second, assuming, *arguendo,* that a lawyer's special position justifies automatic disbarment prior to the exhaustion of appellate rights, no possible justification may be advanced for not reinstating the lawyer upon the total erasure of the conviction by reversal on appeal followed by the dismissal of indictment, since the public does not require protection against a lawyer who has not been convicted of any crime until and unless disciplinary proceedings are concluded against him.

Third, the respondent conceded, at page 12 of its brief, that convicted lawyers are treated differently, but claims this difference is justifiable. If the reversal of the conviction and dismissal of the indictment, as petitioner has argued (See pages 18-19 of the instant petition) had resulted solely in a suspension from practice until all appellate rights had been exhausted, petitioner could have

* In this regard, Rule 8 of this Court itself provides solely for suspension from practice before this Court upon disbarment by a State until the Court may review the case.

thus been "prevented from further participation as a minister of the laws of which he had been convicted of transgressing" (respondent's brief, page 12). The discriminatory fastening of all of the prejudicial consequences recognized by the dissent upon a lawyer disbarred solely by virtue of a void conviction, and not upon a lawyer accused of wrongdoing *de novo,* is totally unjustifiable upon any ground. Petitioner's posture after the reversal of the conviction was the same as if the facts which had led to the erroneous conviction had first been brought to the attention of the disciplinary committee *ab initio* at that point, and as if no criminal proceedings had been brought whatsoever. Clearly, the lawyer's special responsibilities could not possibly justify the deprivation of the right to practice law if disbarment could take place to any hearing whatsoever.

POINT III

The major question raised in the instant petition could not have been raised on appeal from the original order of disbarment and is timely raised.

The arguments found at page 13, *et seq.,* of the respondent's brief, regarding the untimeliness of the claims of deprivation of constitutional rights now urged by petitioner, are clearly lacking in merit. First, it is important to note respondent does not dispute that the New York Court of Appeals holds that all petitions for reinstatement are "not final within the meaning of the constitution" and cannot, therefore, be appealed to the Court of Appeals as of right where a constitutional question is presented, nor

can permission to appeal be sought where no constitutional question is raised. (See page 22 of the petition herein.)

Thus, as respondent correctly points out, the only conceivable order of which review by the Court of Appeals could possibly have been obtained either as of right or by permission, was the original disbarment order. That order, however, had been entered automatically upon the felony conviction. Thus, the sole constitutional question which could have been raised on appeal therefrom was the constitutionality of Section 90, Subdivision 4 of the New York Judiciary Law (the automatic disbarment provision) which is raised in this petition but is not the major contention of petitioner (See page 18 of the petition). The basic contention of petitioner herein is that subdivision 5 of Section 90 is constitutionally infirm, because of its failure to provide for automatic reinstatement following the reversal of the conviction. This point could certainly *not* have been raised on appeal from the original disbarment order inasmuch as the criminal conviction which had itself invoked the disbarment had not yet been reversed.

Second, although petitioner technically could have raised the questions directly involved herein following the denial of initial petition for reinstatement (or thereafter), this Court did not decide the *Schware and Konigsberg* cases until 1957, and, therefore, the contention that a denial of his federal constitutional rights had occurred was unclear as to its validity in 1944.

Third, petitioner certainly did not "sleep on his rights", (this being his fifth petition for reinstatement) and it is

not, therefore, now too late in the day to raise the questions of violations of constitutional rights presented by this petition. See *U. S.* v. *Morgan,* 346 U. S. 502 (1953); *U. S.* v. *Morgan,* 222 F. 2d 673 (2d Cir. 1955); *Sheppard* v. *Maxwell, supra.* In view of the severe consequences of dishonor, loss of professional standing, professional reputation and of livelihood (*Spevack* v. *Klein, supra,* at page 516) no different rule should apply to challenging the validity of such proceedings than in criminal cases.

Fourth, the New York Courts themselves clearly recognize the validity of reinstatement proceedings brought many years subsequent to initial disbarment, see *Matter of Robson,* 284 A. D. 804 (1954); *Matter of Gondelman,* 20 A. D. 2d 805 (1964).* . It is, therefore, incongruous for respondent to argue that time is a bar toward obtaining review of defects in the original proceedings, especially where constitutional rights are involved. See *U. S.* v. *Morgan, supra.*

Finally, the denial without opinion by the Appellate Division of the motion to amend its order does not constitute an "adequate and independent non-federal ground" inasmuch as said denial without opinion is completely equivocal as to its meaning. Moreover, this Court is not bound by such an order upon the question of whether the constitutional question was raised and necessarily de-

* Therein the Court considered newly discovered evidence adduced 24 years subsequent to the original disbarment proceeding and reinstated petitioner.

cided below inasmuch as the Petition below clearly raised the issues (see 16a-22a). If the denial by the Appellate Division of the motion to amend was indeed on ground of untimeliness, this cannot constitute an "adequate and independent non-federal ground", inasmuch as a State may not thereby prevent subsequent redress of its own denial of constitutional rights. *U. S.* v. *Morgan, supra.*

CONCLUSION

For the reasons stated, the petitioner respectfully prays that the within petition for rehearing of the order denying certiorari herein be granted.

Respectfully submitted,

PHILIP J. RYAN,
Attorney for Petitioner,
660 Madison Avenue,
New York, N. Y. 10022.

MORTON L. GINSBERG,
Of Counsel.

Certificate Pursuant to Rule 58

PHILIP J. RYAN, attorney for petitioner herein, certifies as follows:

1. That the within petition is presented in good faith and not for delay.

2. That the grounds asserted herein are restricted to substantial grounds available to petitioner although not previously presented for the reason that a reply brief containing substantially these grounds was prepared, responding to the contentions made by respondent in its brief in opposition. However, said reply brief was being printed at the time the decision herein was handed down.

PHILIP J. RYAN,
Attorney for Petitioner,
660 Madison Avenue,
New York, N. Y. 10022.